gates at his peril. Any servant, of whatever rank, entrusted with the performance of these duties is a vice-principal, and no servant is a vice-principal simply on account of his rank. The master is therefore not liable for the negligent act of a servant in matters of detail in conducting the business. For example, it is a master's duty to supply safe appliances, but under some conditions it is part of the servants' work to construct the appliance from materials supplied by the master. In such a case his liability ends when he supplies sound materials. Thus the construction of temporary scaffolding, to be shifted as the erection of the building progresses, has been held a part of the servants' work.[6] Therefore a master is not liable for injury resulting from negligent construction, even though the injured servant was doing a different class of work from that of the delinquent servant. *Hempstock* v. *Lackawanna Iron and Steel Co.*, 90 N. Y. Supp. 663.

The New York theory is at present accepted by the United States Supreme Court[7] and by the great weight of authority.[8] Some courts, however, apply it with a limitation closely akin to the "superior servant" doctrine. They hold that a general manager or head of a department, to whom the master has delegated all his functions, is a vice-principal by virtue merely of his official position.[9] This exception seems on principle to be unwarranted. No reason appears why official position, if made the test under these particular circumstances, should not be extended to the case of every superior servant. This exception should stand on the same footing with the "superior servant" doctrine, which is far less satisfactory than the theory which makes the character of the negligent act the test. There would seem to be no reason for contending that a servant did not assume the risk of a negligent act solely because it was done by his superior. On the other hand, if the act was done in the performance of a duty not delegable by the master, the injured servant did not assume the risk of injury from such an act, whether done by a servant superior or inferior in rank to himself.

ABANDONMENT AND SUBROGATION IN MARINE INSURANCE. — When a ship is injured by a wrongdoer, if the insurer accepts an abandonment of it and pays as if there had been a total loss, he is given a claim upon the right of action which the insured has against the wrongdoer. This claim has been explained in two ways. The leading English case,[1] although its decision is consistent with either theory, supports the view that the abandonment carries with it the money claim against the tort-feasor as an equivalent of the *spes recuperandi*. There are American opinions to the same effect.[2] On the other hand, it has been suggested that the insurer's claim rests upon the principle that in all contracts of indemnity anything coming into the hands of the insured, which reduces the loss, becomes subject to an equity in favor of an indemnifier who has already paid.[3] Usually either theory would permit the same decision, but in a recent case a choice

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6 Beesley *v.* Wheeler & Co., 103 Mich. 196.
7 Baltimore & O. R. Co. *v.* Baugh, 149 U. S. 368.
8 Fox *v.* Spring Lake Iron Co., 89 Mich. 387.
9 Quincy, etc., Co. *v.* Kitts, 42 Mich. 34.

1 North of Eng., etc., Ass'n *v.* Armstrong, L. R. 5 Q. B. 244.
2 Comegys *v.* Vase, 1 Pet. (U. S.) 193.
3 Burnard *v.* Rodocanachi, 7 App. Cas. 333, *per* Lord Blackburn.

between them was made imperative. The insured under a valued policy abandoned the ship and collected the insurance. Later he recovered a larger amount from the one who had caused the loss. By the first theory this entire amount would go to the insurer; but the court adopted the second view, and allowed the insurer only what he had paid the insured. *The Livingstone*, 130 Fed. Rep. 746 (C. C. A., Second Circ.).

The correctness of the first theory depends upon the effect of the abandonment of a ship. There is nothing in its nature which makes it different from the abandonment of any other property. When accepted by the insurer it makes him the owner of the ship and entitles him to all rights incident to the property, for example, the right to freight not earned before the completion of the voyage.[4] But it does not give him rights not incident to his ownership, such as the right to freight earned either *pro rata* or by delivery of part of the cargo before the casualty.[5] The claim against the tort-feasor did not arise from the violation of a right, incident to the insurer's ownership. The tort-feasor did no damage to the property after the insurer became the owner. This claim, then, differs in nature from the *spes recuperandi* with which it is so often confounded [6] and from all other claims which are based upon the ownership of property transferred by the abandonment. It would seem, therefore, that the origin of the insurer's claim to the money recovered from the tort-feasor must be explained on the theory of subrogation.

There seems to be nothing in the nature of a valued policy to prevent the application of principles of subrogation. The mere fact that it is valued does not change its nature as a contract of indemnity. That simply fixes the amount which as between the insurer and insured shall be taken as the valuation in case of total loss. Consequently the insured, when paid this amount, cannot complain if the insurer is given all sums recovered up to the amount of the valuation, no matter what is the real value of the ship. But since the only reason the insurer has any claim upon the sums recovered by the insured is that he has paid for a loss which later is otherwise recompensed, it is obvious that his claim must be commensurate with the amount paid and must be satisfied when that amount is returned. It is not a violation of equitable principles for the insured to receive a full recompense even though that recompense exceed a valuation which he had previously made; and, in any case, it is difficult to see how the insurer, fully recouped, can have any claim for the excess.

IMPOSSIBILITY BY LAW AS EXCUSE FOR BREACH OF CONTRACT. — Of the grounds commonly recognized as affording a defense to actions upon contract, none is more clearly established than impossibility by operation of domestic law. The rule governing these cases has been applied where the promisor has been prevented from lawfully carrying out his obligation by the acts of the executive branch of the government as well as where the impossibility is due to subsequent legislative enactments.[1]

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[4] Mason *v.* Marine Ins. Co., 110 Fed. Rep. 452.
[5] Red Sea, [1896] P. 20.
[6] Rogers *v.* Hosack's Executors, 18 Wend. (N. Y.) 319.

[1] Touteng *v.* Hubbard, 3 Bos. & Pul. 291; Cordes *v.* Miller, 39 Mich. 581; Baily *v.* De Créspigny, L. R. 4 Q. B. 180.